No. 16020

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. NADINE RODGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

The basic jurisdiction of the District Court is founded upon Title 18, U. S. C. A., Section 3231 (June 25, 1948), and initially arose in this case by reason of an indictment [Clk. Tr. 1] returned by the Grand Jury in the Southern District of California, Southern Division, in which appellant and her deceased husband were charged in one count with the illegal importation of narcotics in violation of Title 21, U. S. C. A., Section 174 (as amended July 18, 1956.) Hearing was had on a motion [Clk. Tr. 5] of appellant to suppress evidence under Rule 41(e)(4), Federal Rules of Criminal Procedure, Title 18, U. S. C. A., and, upon denial of the motion, trial was waived and by stipulation the cause submitted on the transcript and proceedings culminating in said hearing. Judgment [Clk. Tr. 58] was rendered finding appellant guilty as charged and sen-

tencing her to the custody of the Attorney General for a period of five years [Clk. Tr. 56].

The jurisdiction of this court was invoked by a notice of appeal [Clk. Tr. 60] under the provisions of Title 28, U. S. C. A., Section 1291 (June 25, 1948), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended December 27, 1948, effective January 1, 1949).

Statement of the Case.

Throughout this brief, all references to pages in the Clerk's Transcript will be preceded by the abbreviation "Clk. Tr.," while all references to pages in the Reporter's Transcript will be preceded by the abbreviation "Tr."

This is an appeal from a judgment of conviction by which appellant was sentenced to a five year term of imprisonment for the illegal importation of narcotics. Appellant seeks reversal of this judgment mainly on two grounds, viz., that the narcotics seized from her should have been suppressed inasmuch as they were obtained by a search made incident to an unlawful arrest and that the trial judge erred in refusing permission to appellant's counsel to inspect certain government reports from which Agent Clarence Spohr testified at the hearing on the motion to suppress the evidence. In addition to the aforesaid grounds, appellant objects to certain of the findings of fact and conclusions of law of the trial court.

The pertinent facts are as follows: At about 3:00 p.m., October 11, 1957, appellant's deceased husband, Evan W. Rodgers (hereinafter referred to as Rodgers), and one Gilbert Martinez (hereinafter referred to as Martinez) travelling together by automobile entered the United

States from Mexico at the port of entry at San Ysidro, California [Tr. 108]. After preliminary questioning by the customs inspectors at the border, they were taken to the secondary inspection area for further inspection and interrogation, since it was apparently felt by the inspectors that Rodgers might be guilty of failure to register as a former narcotics violator [Tr. 99]. A search of Rodgers' car revealed a suitcase containing woman's clothing and a document concerning a sale of real estate. Rodgers himself had a cashier's check for $2,000.00 [Tr. 109-110]. At about 4:00 p.m., Agent Clarence Spohr arrived at the inspection station and began to interrogate Rodgers [Tr. 98]. According to Spohr, Rodgers told him that in 1952 he had been convicted of conspiracy to violate the narcotics laws in San Francisco [Tr. 100]; that he was a thoroughbred horse trainer [Tr. 100]; that he and his wife (appellant), in company with Mr. and Mrs. Martinez, had come south from San Francisco on a trip; that the two women stayed in Los Angeles with appellant's sister while Rodgers and Martinez and a Mexican lad named Manuel had gone to Tijuana to visit some friends of Rodgers at the racetrack; that he had not found anyone he knew and was, in company with Martinez, returning to the United States [Tr. 100-102].

Following this conversation with Rodgers, Agent Spohr began to interrogate Martinez. At this time (it was about 5:00 p.m.) [Tr. 102], Martinez had already been detained for two hours. Martinez told Spohr that he was out on bail pending trial for a violation of the California narcotics laws (Section 11500 of the Health and Safety Code of the State of California) [Clk. Tr. 45; Tr. 124]; that he was a narcotics addict; and that he had had his most recent heroin injection within the last three days [Clk. Tr.

45; Tr. 128]. Spohr, an experienced customs agent, observed the hypodermic marks of a heroin addict on Martinez' arms [Clk. Tr. 45; Tr. 127]. Martinez then confided to Spohr that he had at one time acted as an informant for the Federal Bureau of Narcotics in San Francisco and, in this connection, mentioned several names which Spohr claimed to recognize as the names of narcotics agents operating in the San Francisco area [Clk. Tr. 45; Tr. 107-108, 125]. After over three hours of confinement and over two hours of continuous interrogation [Tr. 142-143], Martinez offered to make a deal with Spohr in that he agreed to "inform" the agents about certain illegal activities engaged in by appellant and her husband, if the government would grant immunity from prosecution for complicity to Martinez and his wife [Clk. Tr. 46; Tr. 142-143]. Agent Spohr told Martinez that he was "quite positive" the United States Attorney would "go along with anything along those lines" [Clk. Tr. 46; Tr. 143] and use Martinez and his wife as prosecution witnesses against Rodgers and appellant [Tr. 143]. At the time Martinez proposed to inform against his friends, he had been in custody for more than three hours [Tr. 143].

Upon receiving the foregoing assurance from Spohr, Martinez told him the following story: Martinez, his wife, appellant, Rodgers, and one Manuel Garcia, a cousin of Martinez, left San Francisco together on October 6, 1957. The object of the trip was to contact a connection of Garcia in Tijuana in order that Rodgers could purchase heroin. The entire group arrived in Tijuana on October 7, 1957, where Garcia bought some heroin from one "Red" or "Colorado" as he was known to the authorities. Rodgers at this time bought no narcotics because he had no ready cash. Rodgers had in his possession a check for

$3,200.00 which he had received as part payment for the sale of some real estate. All five persons then returned to the United States and proceeded to Los Angeles, where Rodgers cashed his check receiving another check and some cash in return. Garcia represented to Rodgers that he could purchase heroin in Los Angeles thereby obviating the necessity of a return trip to Tijuana. Rodgers gave him $600.00 to make a purchase, whereupon Garcia absconded with the funds. On October 9, 1957, Rodgers, appellant, Martinez, and his wife returned to Tijuana, where Rodgers purchased two contraceptives full of heroin. On October 11, 1957, appellant and Mrs. Martinez returned on foot to the United States at about 1:00 p.m. Rodgers and Martinez were to follow the women two hours later and meet them at the Greyhound Bus depot at San Diego [Finding of Fact No. 3, Clk. Tr. 45-48; Tr. 102-107].

Agent Spohr testified that he had never seen either Martinez or Rodgers prior to their interogation [Tr. 129]; that he did not check any file or any report on Rodgers [Tr. 131] nor had he received a "tip" that Rodgers would be crossing the border on October 11, 1957 [Tr. 129]. Aside from one telephone call to the San Diego Police Department, which revealed a minor infraction of the law by Rodgers [Tr. 131], Spohr's sole basis for his subsequent action against appellant was the information he had gained by interrogating the two men and what he had observed of Rodgers' personal effects [Tr. 130]. He had not as yet seen or talked to appellant.

Sometime after 6:00 p.m. on October 11, 1957 [Clk. Tr. 47], acting upon the foregoing information, Agent Gates took Rodgers from San Ysidro to the San Diego Police Station to be booked for failure to register as a prior nar-

cotics convict. At the same time Agent Spohr and Martinez drove to the Greyhound Bus depot in San Diego, where Martinez had promised to point out his wife and appellant to the officers [Clk. Tr. 47; Tr. 110-111, 172, 177]. The officers had no warrant for appellant's arrest, nor did they attempt to get one [Tr. 153] despite the fact that the court house was within a block of their destination, the bus station [Tr. 149 *et seq.*]. The agents excused this oversight on the grounds that they felt time was of the essence [Tr. 153] and that, if they delayed, appellant would take the "bus north" [Tr. 115]. Arriving at the bus station in San Diego, Spohr and Martinez waited for Gates, who joined them about eight minutes later [Tr. 111-112] in the parking lot at the rear of the station. The three men proceeded into the station but, contrary to Martinez' information, appellant and Mrs. Martinez were not there [Tr. 112]. Martinez then saw the two women in the coffee shop of the Pickwick Hotel [Clk. Tr. 48; Tr. 112]. Preceding the two officers, Martinez by prearrangement entered the coffee shop and identified his wife for the agents by approaching her and kissing her [Tr. 112]. At this point the two agents approached the table and Agent Gates went through a prearranged sham arrest of Martinez [Tr. 184]. Agent Spohr identified himself to the women as a customs agent and asked them their names [Clk. Tr. 48; Tr. 113, 158]. Spohr informed them that they would have to accompany him [Clk. Tr. 48; Tr. 113, 159, 186]. The women immediately submitted to this request [Tr. 159] and began to get out of the booth to leave with the agents. As they were leaving the booth, the women in response to the agents' questions stated that they had just returned from Mexico and had there purchased a straw hat and a pair of shoes. Agent Gates noticed in their possession a shopping bag of a type known by

him to be commonly sold in Mexico [Clk. Tr. 48; Tr. 184]. After the two agents, Mr. and Mrs. Martinez, and appellant had left the coffee shop, Agent Spohr in response to an inquiry from appellant informed Mr. and Mrs. Martinez and appellant that they were under arrest and were being taken to the San Diego jail [Clk. Tr. 48; Tr. 113-114, 160, 185]. *At the time the two agents entered the coffee shop, they had already decided to arrest appellant* [Tr. 187].

Upon arrival at the jail, Agent Gates took Martinez aside to the booking office [Tr. 116], while Agent Spohr escorted the two women down a corridor toward a detention room [Tr. 116]. As Spohr and the two women proceeded down the corridor, Spohr noticed appellant trying to conceal a Kleenex tissue in her hand [Tr. 116]. He immediately demanded that she give it to him, which she did [Tr. 117]. Wrapped in the Kleenex was a contraceptive containing a substance which Spohr believed to be heroin [Tr. 117]. Spohr then demanded of appellant that she give him "the rest of it" [Tr. 117]; whereupon appellant took from her brassiere a second contraceptive containing heroin and gave it to Spohr [Tr. 117].

The case was presented to the Grand Jury in San Diego. Prior to the time a true bill was returned, appellant instituted a civil action in the District Court to restrain the United States Attorney, the agents, and others from securing the issuance of the indictment. This civil action was premised upon appellant's contention that the heroin was obtained from her by a search incident to an unlawful arrest. The trial court refused to make the restraining order and refused to stay the criminal proceedings pending determination of the question by this Honorable Court. A hearing on petitions for mandamus and prohibition was

held by Chief Judge Stephens, and Judges Lemmon and Barnes, in Los Angeles on January 7, 1958. The petitions were denied the following day.

A motion was made by appellant to suppress the seized evidence under the provisions of Rule 41(e)(4) [Clk. Tr. 5]. During the hearing on the motion, held on December 23 and 24, 1957 [Tr. 87 *et seq.*], Agent Clarence Spohr made repeated reference to certain notes he had made on the case presumably at the time of interrogating Rodgers and Martinez [Tr. 138, 139, 140, 141, 145, 164, 165]. During cross-examination, and for the purpose of aiding and developing the cross-examination, appellant's counsel requested that the notes be produced for his inspection [Tr. 165]. The trial judge interposed, examined the documents, and without hearing counsel for the defense on the question permitted only a restricted portion of the notes to be viewed by defense counsel [Tr. 165]. Defense counsel made two more requests to see the documents in question, both of which were likewise denied by the trial judge [Tr. 166]. With the exception above referred to defense counsel was denied all access to the requested notes. Upon conclusion of the hearing, appellant's motion to suppress was denied. Subsequent to the hearing, appellant's husband, Rodgers, met an accidental death and for that reason is no longer a party to this case.

On February 14, 1958, by stipulation, the parties waived formal trial and submitted the case as to the merits on the evidence introduced at the hearing on the motion to suppress [Clk. Tr. 56]. After consideration, the court decided the cause adversely to appellant. Following the court's decision, the findings of fact and conclusions of law were filed by the government. Objections to said findings and conclusions were filed [Clk. Tr. 38] which

resulted in amended findings and conclusions being submitted by the government and signed by the court [Clk. Tr. 44]. Despite appellant's objections, the following findings were finally adopted which, it is submitted by the appellant, are not supported by the evidence:

(a) The finding of fact that the court took judicial notice that it would occasion a delay of several hours to secure a warrant of arrest for appellant;

(b) The finding of fact that informer Gilbert Martinez told witness Spohr that appellant transported heroin across the border in her body cavity;

(c) The finding of fact that there was corroborating evidence for the story of informer Gilbert Martinez.

Likewise, appellant submits the following conclusions of law are not supported by the law, the findings, or the evidence:

(a) The conclusion of law that Agents Gates and Spohr had reasonable grounds to believe that appellant had brought heroin into the United States;

(b) The conclusion of law that there was independent corroboration for much of Martinez' statement to the officers;

(c) The conclusion of law that Agents Gates and Spohr believed the information supplied by Gilbert Martinez is not consistent in law with a reasonable belief founded upon the findings of fact and upon the evidence;

(d) The conclusion of law that the arrest of appellant was valid and legal;

(e) The conclusion of law enumerating the powers of arrest of treasury agents in so far as it purports

to conclude that the agents had reasonable grounds to arrest appellant without an arrest warrant;

(f) The conclusion of law that the agents had a right to search appellant following her arrest in so far as it purports to conclude that appellant's arrest was not unlawful;

(g) The conclusion of law that no search was made of appellant and that the seizure of heroin from appellant was valid and legal; that the appellant agreed to surrender the narcotics; and that no unreasonable means were used in so far as it purports to conclude that the seizure of heroin from appellant was in any way made possible by the voluntary disclosure of said heroin by appellant to the arresting officers.

Appellant's objection to the aforesaid findings and conclusions is preserved for appeal by reason of Rule 52 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., Rule 52(a), which provides in pertinent part:

"Requests for findings are not necessary for purposes of review."

Under said rule, all objections to findings of fact and conclusions of law are deemed reserved and are, accordingly, presented by the general appeal and the Statement of Points. Judgment was entered in this case under which appellant was sentenced to a five year term of imprisonment [Clk. Tr. 58]. This appeal followed [Clk. Tr. 60].

Summary of Argument.

I.

INTRODUCTION.

II.

APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION WERE VIOLATED BY THE ACT OF THE CUSTOMS OFFICERS IN ARRESTING HER WITHOUT A WARRANT.

III.

CERTAIN OF THE FINDINGS OF FACT ARE NOT SUPPORTED BY THE EVIDENCE.

(a) *The findings of fact that the court took judicial notice that it would occasion a delay of several hours to secure a warrant of arrest for appellant is not supported by the evidence.*

(b) *The finding of fact that informer Gilbert Martinez told witness Spohr that appellant transported heroin across the border in her body cavity is not supported by the evidence.*

(c) *The finding of fact that there was corroborating evidence for the story of informer Martinez is not supported by the evidence.*

IV.

CERTAIN OF THE CONCLUSIONS OF LAW ARE NOT WELL TAKEN IN LAW, NOR ARE THEY SUPPORTED BY THE FINDINGS OF FACT OR BY THE EVIDENCE.

(a) *The conclusion of law that Agents Gates and Spohr had reasonable grounds to believe that appellant had brought heroin into the United States is not supported in law, by the findings of fact, or by the evidence.*

(b) *The conclusion of law that there was independent corroboration for much of Martinez' statement to the officers is not supported in law, by the findings of fact, or by the evidence.*

(c) *The conclusion of law that Agents Gates and Spohr believed the information supplied by Gilbert Martinez is not consistent in law with a reasonable belief founded upon the findings of fact and upon the evidence.*

(d) *The conclusion of law that the arrest of appellant was valid and legal is not supported in law, by the findings of fact, or by the evidence.*

(e) *The conclusion of law enumerating the powers of arrest of treasury agents is not supported in law, by the findings of fact, or by the evidence in so far as it purports to conclude that the agents had reasonable grounds to arrest appellant without an arrest warrant.*

(f) *The conclusion of law that the agents had a right to search appellant following her arrest is not supported in law, by the findings of fact, or by the evidence, and particularly is not so supported in so far as it purports to conclude that appellant's arrest was not unlawful.*

(g) *The conclusion of law that no search was made of appellant, that the seizure of heroin from appellant was valid and legal, that the appellant agreed to surrender the narcotics, and that no unreasonable means were used is not supported in law, by the findings of fact, or by the evidence, and particularly is not so supported in so far as it purports to conclude that the seizure of heroin from appellant was in any way made possible by a voluntary disclosure of said heroin by appellant to the arresting officers.*

V.

IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO PERMIT APPELLANT'S COUNSEL TO EXAMINE THE REPORT FROM WHICH WITNESS SPOHR REFRESHED HIS RECOLLECTION WHILE TESIFYING AT THE TRIAL.

ARGUMENT.

I.

Introduction.

This is an appeal by E. Nadine Rodgers, appellant herein, from a conviction of unlawful importation of narcotics. At the outset it should be made clear that appellant admits that contraceptives seized from her at the San Diego police station did contain heroin and that she did bring said heroin into this country from Mexico on October 11, 1957. However, appellant contends that the arresting officers, although acting in personal good faith [Tr. 120], did not have probable cause to arrest appellant without a warrant and that appellant's motion, brought under Rule 41(e)(4), to suppress the evidence should have been granted by the court below. Appellant further contends that in addition to certain erroneous findings of fact and conclusions of law hereinafter treated the Honorable Trial Judge erred in refusing appellant's counsel the opportunity to inspect the report used by Agent Spohr in testifying at the hearing on the motion to suppress.

II.

Appellant's Rights Under the Fourth Amendment to the Federal Constitution Were Violated by the Act of the Customs Officers in Arresting Her Without a Warrant or Probable Cause.

Appellant first assigns as error the failure of the trial court to grant appellant's motion to suppress the evidence, under Rule 41(e)(4) of Title 18, U. S. C. A., based upon the fact that the arresting officers violated appellant's Fourth Amendment rights by arresting her without a warrant and without probable cause.

Restrictions on the arresting power of federal peace officers find their genesis in the constitutional interdiction of the Fourth Amendment to the Federal Constitution which provides:

> "The right to the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Although not specifically permitted by the strict wording of the Amendment, it is, of course, axiomatic that all arrests need not be made upon warrant. Peace officers have certain residual powers in the absence of an arrest warrant which have carried down since the earliest days of the common law. It has long been established that in the absence of a specific federal arrest statute federal officers are governed by the arrest practice which prevails in the state in which the arrest is made.

> *Cline v. United States* (9th Cir., 1925), 9 F. 2d 621;
>
> *United States v. Horton,* 94 Fed. Cas. 15393.

Looking to the rule of arrest to be followed in the instant case, we find that the arresting agents, Spohr and Gates, were agents of the United States Customs Service and that they arrested appellant for an alleged violation of the federal narcotics laws. While there is a question whether customs agents had such power prior to 1956, since that time the question admits no argument as in that year

Congress passed Title 26, U. S. C. A., Section 7607, which provides in pertinent part:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in Section 401(1) of the Tariff Act of 1930, as amended; 19 U. S. C., sec. 1401(1)), may—
>
> * * * * * * * *
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The foregoing statute merely codifies for a specific class of violations the powers of arrest classically possessed by peace officers at the common law. Historically where a violation was committed without his presence a peace officer was justified in making arrests without a warrant only where he possessed sufficient personal knowledge such as would justify a reasonably prudent man to believe that a felony had been committed and that the arrestee had probably been the offender. Mere suspicion on the part of the officer, no matter how well intentioned, is not a sufficient predicate for a valid arrest. As stated by the Eighth Circuit:

> "The proper test, supported by the great weight of authority, * * * is were the circumstances presented to the officers through the testimony of their

> senses sufficient to justify them in a good-faith belief that plaintiff in error was in their presence transporting liquor in violation of law or that he had in their presence liquor in his possession in violation of law? In other words, was there probable cause for them to so believe, or were the facts sufficient to give rise merely to a suspicion thereof? If the former the arrest was legal and the evidence secured by it admissible. If the latter, the arrest was illegal, and the evidence obtained not admissible."
>
> *Garske v. United States* (8th Cir., 1924), 1 F. 2d 620, 625, quoted with approval by this court in
>
> *Brown v. United States* (9th Cir., 1925), 4 F. 2d 246.

The question of what constitutes "probable cause" is a troublesome one, but this court in

> *Hernandez v. United States* (9th Cir., 1927), 17 F. 2d 373,

adopted the rule expressed in 2 R. C. L. 451, in defining probable cause, as follows:

> "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."

See also:

> *United States v. Walker* (7th Cir., 1957), 246 F. 2d 519.

The question of whether the agents in the instant case had probable cause for arresting appellant was raised by appellant on her motion to suppress the evidence brought under Title 18, U. S. C. A., Rule 41(e)(4), which motion made it incumbent upon the government to establish

that the arresting agents were possessed of such knowledge that as reasonably prudent men they believed beyond mere suspicion that appellant had violated the federal narcotics laws. The basic purpose to be accomplished by the government's proof at such a hearing is not to establish the ultimate fact of whether or not a given defendant is actually guilty of a crime, but, rather, to show the state of mind of the arresting officer at the instant of arrest, more particularly, to show that in his mind he, as a reasonable person, believed that there was a reasonable probability that a crime had been committed and that the defendant had committed it. If the government's proof establishes this state of mind to the reasonable satisfaction of the magistrate, it can be said that the arresting officer had probable cause for his actions and the arrest and incidental searches thereto were valid.

At the hearing below, only two witnesses testified, viz., Agents Gates and Spohr, and both of them for the government. Since the appellant called no witnesses and, with the exception of an affidavit, adduced no evidence, their testimony as to the facts upon which they formed their belief stands uncontradicted. However, appellant contends that, even accepting the government's evidence, it is clear beyond peradventure that the agents did not possess that requisite degree of certainty as would constitute probable cause for arrest without a warrant.

Reviewing then the evidence upon which the arresting agents relied in determining in their minds that they had probable cause to arrest appellant without a warrant, it is apparent that the only evidentiary facts which may be considered were those which were gleaned by the agents in the period which commenced on their arrival at the inspection station at San Ysidro and ended with their arrest

of appellant in the coffee shop of the Pickwick Hotel some five hours later. Prior to the time of arrival at San Ysidro, the agents had never seen or heard of either Martinez or Rodgers [Tr. 129]. They had received no advance tip that Rodgers or Martinez was engaged in smuggling activity [Tr. 129]. The agents did not check any files or reports on Rodgers [Tr. 131]; nor, with the exception of a telephone call to the San Diego police which revealed a minor infraction of the law by Rodgers, did they make any outside inquiry as to his reputation or character [Tr. 131]. It nowhere appears that the agents even knew of the existence of appellant or her presence in the area prior to the information they received during their interrogations. As of the time that Agent Spohr began to interrogate Gilbert Martinez, his information consisted of the following facts: that Rodgers had a prior narcotics conviction; that he was coming into the United States from Tijuana; that he lived in San Francisco and had gone to Tijuana for the purpose of seeing some friends around the racetrack; that he had met no one he knew at the racetrack; that his wife had accompanied him from San Francisco but had remained in Los Angeles with her sister; that he carried on his person a check for $2,000 and a small amount of cash; and that luggage in the trunk of Rodger's car contained woman's clothing and some papers relating to the sale of real property.

The agents at this time did not know that appellant was anywhere within the Southern Division of the Southern District of California. The major portion of the information upon which the agents acted in arresting appellant was obtained from Agent Spohr's interrogation of Martinez. During the first two hours of his interrogation, Martinez gave Spohr only general information, viz., that he was

on bail pending trial for a violation of Section 11500 of the California Health and Safety Code [Tr. 124]; that he was a narcotics addict and had had his most recent heroin injection three days before [Tr. 128]; and that he had at one time acted as an informant for the Federal Bureau of Narcotics in San Francisco and had worked with certain agents whose names were familiar to Spohr. In addition, during this time Spohr noticed the marks of a heroin addict on Martinez's arms. It was not until after two hours had passed that Spohr received any information from Martinez which bore on appellant. At this time, Martinez offered to give information about alleged illegal activities involving appellant in return for a pledge of immunity from prosecution for himself and his wife [Tr. 142-143]. Having received a positive assurance of immunity from Spohr [Tr. 143], Martinez then told Spohr the story which has been heretofore set out in the Statement of the Case in this brief. Most pertinent to appellant was the information that she had accompanied Martinez and Rodgers to Tijuana; that Rodgers had suggested that she conceal heroin in her body cavity and, in company with Mrs. Martinez, cross the border into the United States at 1:00 p.m., on October 11, 1957; that the women had, in fact, crossed the border at that time and were then waiting for Martinez and Rodgers in the Greyhound Bus depot at San Diego.

Taking the information received from Martinez and Rodgers in conjunction with the products of the border inspectors' search of Rodgers' automobile and person, the agents decided that they possessed sufficient information to have probable cause to believe that a crime had been committed and that appellant was the perpetrator thereof. Having made this decision, the agents proceeded im-

mediately to the Greyhound Bus depot in San Diego for the purpose of apprehending appellant. No attempt was made to secure a warrant either by calling ahead to some magistrate or by seeking a magistrate once San Diego was reached. The agents testified that, since they felt that time was of the essence and appellant might take the next bus north, they need not make an attempt to secure a warrant for her arrest. Appellant was located in the coffee shop of the Pickwick Hotel in San Diego and at the time the agents entered the coffee shop they had already made up their minds, on the basis of their then information, to arrest appellant.

Agent Spohr approached the table at which appellant was sitting with Mrs. Martinez and identified himself as a customs officer and asked them their names. He then immediately informed them that they would have to accompany him [Clk. Tr. 48; Tr. 113, 159, 186]. Although the formal ritual of arrest was not performed until some moments later after the women were outside the coffee shop, it is the position of the appellant that, inasmuch as she submitted immediately to Spohr's request made under color of authority, the arrest actually took place at the moment that he requested the women to come with him. Thus in

> *People v. Randolph* (1957), 147 Cal. App. 2d 836, 841, 306 P. 2d 98,

it was held that an arrest was accomplished by the submission to custody of a motorist who stopped and alighted from his vehicle when he saw a police car following him, and was accused at that time by the policeman of a violation of a section of the Vehicle Code.

Of particular applicability are the words of Judge McAllister in his dissenting opinion in

Gilliam v. United States (6th Cir., 1951), 189 F. 2d 321, 327:

> "If officers do not have probable cause to arrest or search, their restraint of another's freedom of locomotion by words, acts, or the like, which would induce a reasonable apprehension that force would be used unless he submitted, constitutes an arrest. To constitute an arrest, it is not necessary to touch the person of one who is arrested, or to state to him that he is arrested."

See also:

Willson v. Superior Court (1956), 46 Cal. 2d 291, 294 P. 2d 36;

People v. Martin (1955), 45 Cal. 2d 755, 290 P. 2d 855.

Since the arrest was made as aforesaid when appellant peacefully submitted at the request of Agent Spohr, events which occurred subsequent to the arrest cannot be held to be corroborative of the information possessed by the arresting officers. Thus in arriving at the question of whether the officers had probable cause to arrest appellant, no credence can be given to the statement of the women that they had just returned from Mexico; that they had there purchased a straw hat and pair of shoes; and that they had in their possession a shopping bag of a type commonly sold in Mexico. These last bits of information being ascertained by the officers subsequent to the arrest could have no bearing upon their state of mind as to probable cause for the arrest; nor can any extra aura of truthfulness be accorded to Martinez's information merely because it ultimately turned out to be correct

in that appellant did possess heroin as he said, it being well established that the legality of an arrest cannot be aided by what a search incident thereto turns up. Thus, as stated in

> *United States v. Di Re* (1948), 332 U. S. 581, 92 L. Ed. 210, 220:
>
> "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

See also:

> *Byars v. United States* (1927), 273 U. S. 28, 29, 71 L. Ed. 520, 522;
>
> *Gilliam v. United States* (6th Cir., 1951), 189 F. 2d 321, dissenting opinion, 326, 327, *supra.*

A recital of the information available to the officers which prompted their action in arresting appellant clearly points up the fact that the motivating information consists entirely of the information furnished to them by the informer Martinez. Absent his story, there was no probable cause to arrest appellant. In fact, it was only through the information proffered by Martinez that the agents even knew of appellant's presence in the vicinity.

The crucial question on this segment of the appeal is thus whether the information given by Martinez in and of itself constitutes probable cause for the arrest of appellant without a warrant. It is the appellant's firm position that it does not. It clearly appears from the facts of this case that prior to the time Agent Spohr arrived at the inspection station at San Ysidro he knew nothing of Martinez. He had never seen him. He had never heard of him [Tr. 129]. He had had no prior dealings with him either

as an informant or otherwise. In so far as the arresting agents were concerned, despite his story of having been an informer for narcotics officers in San Ysidro, the reliability of Martinez was an unknown factor.

The proposition that the uncorroborated tip of an informant of unknown reliability does not constitute probable cause for arrest without a warrant is too well established to admit a doubt. The reason for the rule is clear. Unless the officers have had prior dealings with an informant which would establish his reliability, they have no way of gauging the motivations which prompt the informer to supply his information. Were the Safeguard of established reliability to be bypassed, immeasurable harm and embarrassment could result to innocent persons. An arresting officer in the exercise of his authority could become the tool of an informant whose possible motivation runs the gamut from sheer mischief to calculated self aggrandizement. Likewise, unless the snaffle of reliability be retained, over-zealous officers of the law could, by repeated arrests based upon mere supposition, conjecture, or surmise, set at naught the protections afforded by the Fourth Amendment.

The courts have repeatedly recognized the necessity for requiring a showing of previous reliability of the informer if they are to uphold an arrest without a warrant based solely on the informer's tip. As was stated in

> *United States v. Turner* (D. C. Md., 1954), 126 Fed. Supp. 349,

in quoting a treatise on the law of search and seizure by Ernest W. Machen, Jr.:

> " 'Tips from reliable informers, if backed up by some personal knowledge on the part of the officer, as in a case where he has checked his information

against actual conditions, may be very valuable. Some cases seem to go so far as to say a search may be made on information which the officers believe to be reliable as distinguished from that which they know to be true from their own knowledge, or from information which they have checked. But the general rule seems to be that tips must be supplemented by further facts before they can be relied on. It is uncertain whether names of informers must be disclosed. It has been said that "public policy forbids disclosure of an informer's identity unless essential to the defense." Yet searches are generally not approved if there is no other evidence than a tip by an undisclosed informer.' "

In

United States v. Castle (D. C., 1955), 138 Fed. Supp. 436, at 439,

the court stated:

"An arrest or warrant for an arrest may not be based upon the suspicion or opinion of some person, unsupported by personal knowledge of the facts, and a warrant to search a private home may not rest upon a mere statement of suspicion without the disclosure of supporting facts and circumstances to justify the suspicion. (Citing cases.)

"The Court has reached the conclusion that the arrest was illegal; that the uninvestigated tip of this informer was not sufficient to establish the probable cause needed for a legal arrest.

"While we do not question the good faith of the officers, their subjective good faith is not enough unless it is bottomed upon facts within their personal knowledge, some of which at least, would be competent as evidence in the trial of the offense before a jury. (Citing cases.)

"Here the officers assumed the reliability of the informer and accepted the tip as gospel. They were able to relate it to the defendant as being the same individual about whom they had heard rumors in the past. But there was no emergency. The officers had heard of defendant's activities in the past. They had no reason to believe that he was about to flee or suddenly cease peddling narcotics. There was no compelling reason why they could not have had the house put under general surveillance until they were able to obtain a search warrant the next morning. Yet no such steps were taken, nor did the officers obtain, nor even seek to obtain, an affidavit of the informer. Under these circumstances we cannot sanction this arrest. Declaration of, and reliance upon suspicion or belief, without more, will not do. See *United States v. Reynolds,* D. C. 1953, 111 F. Supp. 589.

"While the evidence might be construed to infer that the officers were justified in going to the apartment of defendant to question him about the accusation, the more reasonable inference is that they went to the apartment for making an arrest. (Citing cases.)"

In

United States v. Blich (D. C. Wyo., 1930), 45 F. 2d 627,

the court expressly recognized the danger of harassment, embarrassment, humiliation and vexation of innocent parties which could arise by permitting arrests to be made solely upon the information supplied by informants of unknown reliability when it said at 629:

"It is conceivable that a prohibition agent in the earnestness and eagerness of performing his duty might adopt very shadowy leads. But what is of greater consequence is that an ill-intentioned person

might give an officer information which would in many instances lead to humiliation and vexation of the innocent automobile driver upon the public highway, * * *."

In

Contee v. United States (D. A. D. C., 1954), 215 F. 2d 324, 326,

the arresting officers had received information from a man living in Contee's neighborhood that Contee "'was the party that had been involved in some robberies.'" Based upon this information, the officers proceeded to Contee's house and knocked on the door. After a long interval Contee opened the door and was arrested by the officers. A search resulted and certain incriminating items were discovered. During the trial, Contee's motion to suppress these items as evidence was denied and Contee appealed from a judgment of conviction. The Court of Appeals for the District of Columbia in reversing and remanding for a new trial stated at page 327:

"The question is—did the officer making the arrest have probable cause to believe that the person arrested had committed an offense? See *Mills v. United States,* 90 U. S. App. D. C. 365, 196 F. 2d 600, certiorari denied, 1952, 344 U. S. 826, 73 S. Ct. 27, 97 L. Ed. 643. As we have seen, the officer here testified that an individual who 'lived in the neighborhood, apparently, and knew Contee' was his sole source of information. *An uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause to make an arrest.*" (Emphasis added.)

See also: cases cited in Note 1, page 327 of 215 F. 2d.

In

Worthington v. United States (6th Cir., 1948), 166 F. 2d 557,

appellant's living quarters were searched by the arresting officers and a considerable store of narcotics was discovered in the search. Appellant's motions to suppress the evidence were denied and the appellant convicted. On appeal the Court of Appeals for the Sixth Circuit extensively considered the point of whether the officers had probable cause to believe that appellant was committing a felony such as would justify a search of her living quarters and an arrest of her person without a warrant. Relative to the issue of probable cause it appeared that an agent of the Federal Bureau of Narcotics received a telephone call from a man who refused to give his name. However, the caller asked questions of the agent relating to the agent's knowledge of other persons involved in the narcotics traffic. The information divulged by the unknown caller relative to these other persons was to the agent's knowledge correct. The caller then stated to the agent that he had information that appellant was likewise engaged in the narcotic traffic and told the agent that appellant was concealing narcotics in a storeroom and a safe in her home. Following the anonymous telephone call the agent proceeded to "corroborate" the information by checking the files of the Federal Bureau of Narcotics. These files reflected an investigation of appellant's paramour that had been carried on by an Agent Rudd some years previously. Some of the information in the files related to appellant. There was also testimony that a girl who had been convicted of a narcotics violation had at one time resided in a sporting house operated by appellant in Saginaw, Michi-

gan. The court in reversing and remanding remarked at page 564:

> " 'A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (citing cases); and would lead a man of prudence and caution to believe that the offense had been committed. (Citing cases.)'
>
> "What is set forth as the requirement for evidence to justify the issuance of a search warrant, applies equally to a warrant for arrest; and neither search warrant nor an arrest with or without warrant can be made in any case without personal knowledge on the part of the official making application for a warrant, or the officer making the arrest without a warrant, of facts that would be competent in the trial of the offense before a jury."

The court went on to say at page 565:

> "None of the arresting officers—nor all of them together—had personal knowledge of sufficient evidence of probable cause to arrest appellant, that would have been admissible before a jury on a trial for the offense. The anonymous telephone conversation would not have been admissible. Rudd, the federal narcotics officer, could not have testified with respect to the description given to him by other persons of the man and truck at Standish at the day of the robbery of the stock of narcotics from the rug store at that city; and could not have testified that the man and the truck so described were identical to the man and truck he had seen some months before at the house on South Water Street. This would all have been hearsay—and poor hearsay at that, since the record of the trial discloses that Rudd testified that he 'did not pay any attention to that truck or the man' when he saw them. An arrest and

search on such flimsy pretext of evidence is in violation of the law. Furthermore, Rudd did not make the arrest nor was he present at the time. He was out of the state when the arrest of appellant was first considered, and also when it was actually made. All this information from Rudd was found in a file in the office of the bureau in Detroit. *An arrest and search without a warrant cannot be justified by an officer on information which he finds in a file which has been made up by someone else. He must have personal knowledge of facts showing probable cause.*" (Emphasis added.)

In

United States v. Clark (D. C., W. Dist. Mo., W. Div., 1939), 29 Fed. Supp. 138, 140,

the court stated:

"It seems to us that the Fourth Amendment to the Constitution, U.S.C.A., is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever (and there was none here) that the informer's information was itself more than mere guess-work and speculation."

See also:

Johnson v. United States (1948), 333 U. S. 10, 92 L. Ed. 436;

Wisniewski v. United States (6th Cir., 1931), 47 F. 2d 825 (which reached the conclusion that there was probable cause but at p. 826 questioned whether information received from an informant of known reliability in and of itself constituted probable cause for arrest without a warrant);

The means used to obtain the story from Martinez weaken the probability of its truthfulness and should have been so considered by the arresting officers.

As was trenchantly stated by the court in

People v. Bates (Oct. 2, 1958), ... Cal. App. 2d ....., 330 P. 2d 102, 106:

"Of course, coercion practiced on an informer is a factor affecting the credibility of the informer, * * *"

Aside from Martinez's story, Agent Spohr admittedly had no other information that appellant was violating any law [Tr. 157]. Agent Spohr's testimony on this subject is very revealing. At page 157 of the Transcript, he was asked:

"Q. Had you ever seen Mrs. Martinez before that time? A. No, sir.

Q. Had you ever seen Mrs. Rodgers before that time? A. No, sir.

Q. Did you know anything at all about Mrs. Rodgers other than what Mr. Martinez had told you? A. No, sir.

Q. Your sole source of information, then, was Mr. Martinez? A. And facts that I assumed in my own mind, yes, sir."

As this Honorable Court has heretofore stated in

Brown v. United States (9th Cir., 1925), 4 F. 2d 246, 247, *supra:*

"While an officer may arrest without warrant for reasonable cause, he can only act upon evidence; *he cannot act upon mere suspicion.*" (Emphasis added.)

It is the position of the appellant that the sole information upon which the officers assumed to arrest appellant

without a warrant was that coerced from Martinez, a man of poor reputation, previously unknown to the officers, and a man of unknown reliability; that, accordingly, no matter what the subjective good faith of the officers may have been they acted without probable cause in arresting appellant without a warrant.

In the court below, the government made claim that there was corroboration. At page 198 of the Transcript the Assistant United States Attorney stated:

> "But beyond that, I think we have corroboration in this case. I think we have corroboration by the past narcotics record of the defendant Rodgers, which was checked up on. I think we have the $2000 check, which corroborated what Mr. Martinez said—that is, that they returned to Los Angeles and got that check and went back to buy it. We have the women's clothing in the trunk of the car, whereas Mr. Rodgers said that the women had stayed in Los Angeles and Mr. Martinez said they had come down to Mexico. I think that the Agent relied upon the fact that it is reasonable that if they had stayed in Los Angeles they wouldn't have sent their clothing ahead to Mexico. We have the fact that when they went into the restaurant, before they made the arrest, Mr. Martinez was greeted by his wife and they appeared to know one another; that they stated what their names were, and that they stated that they had come from Mexico; that they had those Mexican baskets, which again the Agent could infer corroborated the fact that they had been in Mexico. We have the whole circumstances surrounding the situation, and in a sense it was all one transaction right there from the border. We have the corroborating fact that Mr. Martinez gave the names of undercover Agents in San Francisco with whom he worked and established that he had some experience as an

informant, which the Agent might have used to think that he was more credible. We had the story by Mr. Rodgers to the Agent that he was a breeder of horses and a trainer and that that is why he went down to Mexico and visited the racetrack each day but didn't meet anybody he knew."

Considering these contentions of corroboration seriatim, it will be seen that taken singly or collectively they contitute no corroboration at all:

First: It is claimed that the past narcotics record of the defendant Rodgers (appellant's husband), now deceased, affords corroboration. Rodgers, it is true, admitted a prior narcotics offense. The government claimed below that it was checked upon. This is not borne out by the record. The sole reference to checking on Rodgers' narcotics conviction is contained on page 136 of the Transcript, where Agent Spohr testified:

"* * * And I called 'Bud' Hawkins of the State Narcotics Bureau and asked him just more or less to verify Mr. Rodgers' 1932 arrest.

Mr. Seavey: '52?

The Witness: '52 arrest."

From the statement of the agent it is not apparent that he received any information from Hawkins which would indicate one way or the other whether Rodgers did, in fact, have a prior narcotics conviction. However, assuming *arguendo* that such information was provided, it is W. Rodgers (deceased), it has no application to appellant as it does not follow that the mere fact that her hus- submitted that, while it may have materiality as to Evan band had a narcotics arrest five years previously indicates that she was engaged in the narcotics traffic.

Second: The fact that Rodgers had a $2,000 check on his person is relied upon as corroboration of Martinez's story. It is respectfully submitted by the appellant that such a check is corroborative only of the fact that Rodgers possessed a considerable sum of money. The check was not introduced into evidence, and the only identifying reference to it was made by Agent Spohr at page 110 of the Transcript, where he said, speaking of Rodgers, "In his possession at the time was a Bank of America cashier's check for $2000." It is urged by the appellant that this court may take judicial notice of the fact that the Bank of America is presently the largest banking institution in the world with branches throughout California. There is nothing in the record which would indicate that the check was, in fact, obtained from a Los Angeles branch of the bank and, accordingly, the mere possession of the check gives no credence to the story that Rodgers "returned to Los Angeles and got that check and went back to buy it."

Third: The government has claimed that the mere fact that the trunk of Rodgers' car contained woman's clothing corroborated Martinez's story—that "It is reasonable that if they had stayed in Los Angeles they wouldn't have sent their clothing ahead to Mexico" [Tr. 198]. This happenstance would be worthy of more weight had it been claimed by Rodgers that his wife was in San Francisco where they lived; however, it is admitted that the parties were traveling. His wife was, according to Rodgers, in Los Angeles roughly 150 miles away from the place where he was apprehended [Tr. 101-102]. It is not uncommon for persons traveling to remove only those clothes which are needed to meet their requirements and leave the balance in the car. In addition, there is nothing about the discovery of

woman's clothing in the trunk of an automobile which would lead one to believe that appellant, a person whose very existence was unknown to the agent, was, in fact, smuggling narcotics; nor does it appear from the record [Tr. 102-107] that the clothes were identified as belonging to appellant. The presence of the clothes was not corroborative of Martinez's story.

Fourth: The government claimed that the fact that prior to the arrest Martinez and his wife appeared to know one another when they met in the restaurant is somehow corroborative of his story. Certainly Mrs. Martinez would greet her husband when she met him and certainly Mrs. Martinez and appellant had every right to be in the restaurant. Their conduct there was innocent enough, it being stated at page 156 of the Transcript:

> "What was Mrs. Martinez and Mrs. Rodgers doing? A. Sitting there drinking coffee.
>
> Q. Just like anybody else? A. I guess so.
>
> Q. Just like the rest of the people who were in the restaurant? A. Yes.
>
> Q. There wasn't anything suspicious about what they were doing, was there? A. No, sir.
>
> Q. It was a regular public restaurant that they were in? A. That is correct."

Of interest in this respect is the language of the California Supreme Court in

> *Willson v. Superior Court* (1956), 46 Cal. 2d 291, 294 P. 2d 36, *supra,*

wherein it was stated at page 295 of the California Report:

> "Petitioner was found in the bar near the telephone where the informer had stated she would generally be. Since such innocent conduct could be known, however, to anyone who frequented the bar, it is doubtful

> whether it was verification alone which would justify reasonable reliance on the additional information charging petitioner with bookmaking."

This presents a different case from those in which the arrested person is found in some unusual circumstance or at some unusual place. Appellant submits that the mere innocent presence of a person in a public place engaged in the normal pursuits indigenous to that place can offer no corroboration to the story of an informer.

> *People v. Goodo* (1956), 147 Cal. App. 2d 7, 304 P. 2d 776.

Particularly is this true in the instant case where the appellant was found in the Pickwick Hotel when Martinez had stated that she would be found in the Greyhound Bus depot.

Fifth: For some reason the government below seemed to feel that the fact that appellant and Mrs. Martinez stated their names when asked corroborates Martinez's story. This is patently absurd. For the same reasons mentioned in the preceding paragraph, appellant contends that if the women had a right to be in the coffee shop they could presumably tell someone their names without corroborating their part in some crime.

Sixth: In the court below, the government put some stress upon the fact that the women stated that they had come from Mexico and that they had Mexican baskets, from which the agent could infer that they had been in Mexico. Assuming *arguendo* that Mexican type baskets are sold only on the Mexican side of the border, appellant respectfully calls to the attention of the court that these facts were noted and the answers received subsequent to the time of arrest [Clk. Tr. 48; Tr. 113, 159, 186]. On

page 113 of the Transcript the following appears in Agent Spohr's testimony:

> "* * * I identified myself to both women as a Customs Agent and in the Customs Agency Service at San Diego and showed them my credentials, my commission.
>
> Q. By Mr. Seavey: And then what did you say to them? A. I asked both women at this time if they would accompany me.
>
> Q. Did you ask them about who they were at that point? A. Yes, we did ask their names, and they gave it as Mrs. Martinez and Mrs. Rodgers.
>
> Q. And then what did you say? Tell us as best you can remember the exact words you used and what they said. What did you say next? A. The next words I asked, if both the ladies would accompany me, and they got up out of the booth and stated they had a check to pay, and as they walked toward the booth Agent Gates asked them, who had been right at my elbow, if they had just arrived from Mexico, and they said, 'Yes, a few hours before.' "

As heretofore pointed out, the actual arrest of appellant took place at the time of her submission to apparent lawful authority, viz., when she acquiesced in Agent Spohr's request to accompany him. It is axiomatic that information or evidence seized subsequent to the arrest can in no way bear on the probable cause that existed in the mind of the officer in making the arrest. The arrest itself serves as a cutoff point. If probable cause did not, in fact, exist at that time, subsequent discoveries cannot supply it. As the late Mr. Justice Jackson stated in

> *United States v. Di Re* (1948), 332 U. S. 581, 92 L. Ed. 210, 220:
>
> "The government's last resort in support of the arrest is to reason from the fruits of the search to

> the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

Therefore, the fact that the women stated that they came from Mexico and that they had Mexican baskets in their possession could have no bearing, coming after arrest as it did, on the agents' state of mind at the time of the arrest. Moreover, as has heretofore been pointed out, at the time the two agents entered the coffee shop they had already decided to arrest appellant [Tr. 187].

Seventh: The Assistant United States Attorney below made reference to the fact that "We have the whole circumstances surrounding the situation, and in a sense it was all one transaction right there from the border" [Tr. 199]. It is in no wise clear to the appellant exactly in what manner the agents, upon entering the coffee shop, could have known that it was "one transaction right from the border"; nor for that matter is it clear to appellant exactly what was meant by this.

Eighth: It was urged below that the fact that Martinez gave the names of undercover agents in San Francisco with whom he worked somehow established that he had some experience as an informant which gave credence and reliability to his statements to Agent Spohr. (In this connection it should be noted that Martinez did not state that the agents with whom he had cooperated in San Francisco were undercover agents. At page 125 of the Transcript, Spohr stated that Martinez had informed him that "he had worked for the Federal Bureau of Narcotics in the past, and he named the Agents Casey,

Nicoloff, Sporosbouski and a few others I recognized the names.)

Appellant urges that the mere supplying of the names of agents in another city is by no means corroborative of a person's story. Martinez had already stated to Agent Spohr that he was awaiting trial for a violation of Section 11500 of the California Health and Safety Code, which would establish him as having had some contact with narcotics agents. However, it in no way establishes on which side of the law he contacted them. Nevertheless, assuming that Martinez had acted as a confidential informant for the Federal Bureau of Narcotics in San Francisco, this fact gave no corroboration to Agent Spohr in establishing probable cause. If the named agents themselves had talked to Agent Spohr and told him, "Yes, we know Martinez, and Martinez has worked with us and has proved reliable," this would be hearsay and not the personal knowledge of Spohr such as would warrant the formation of probable cause in his mind. The situation would not be unlike that presented in

> *Worthington v. United States* (6th Cir., 1948), 166 F. 2d 557, *supra,*

in which the agents relied upon the contents of a file made out by another agent. In reversing that case for lack of probable cause, the Sixth Circuit stated, as heretofore quoted, page 565:

> "An arrest and search without a warrant cannot be justified by an officer on information which he finds in a file which has been made up by someone else. He must have personal knowledge of the facts showing probable cause."

As stated by Judge McAllister in his dissenting opinion in

Gilliam v. United States (6th Cir., 1951), 189 F. 2d 321, 325, *supra:*

> "Although the fact that evidence furnished an officer by an informer—if the officer considers him a reliable informer—may constitute probable cause for an arrest, nevertheless, it does not follow that an arrest is made by an officer with probable cause where he relies upon information which has been furnished him by another party who has received such information from an informer unknown to the officer making the arrest."

If information from the named San Francisco agents that Martinez was reliable would not enable Spohr to form a valid opinion as to his reliability, how, indeed, can the self serving statement of Martinez furnish corroboration to his story such as would give Spohr probable cause to make the arrest without a warrant?

Ninth: The government in the court below counted as corroborative of Martinez's story the fact that Rodgers said that he was a horse breeder and that he visited the race track at Caliente but did not meet anybody he knew. Appellant doubts whether the negative circumstance of not doing something or not meeting someone can provide corroboration for Marintez's story that she possessed illegal narcotics. Appellant urges that it is not at all unusual for a person to drop by a race track to visit friends and not find anyone there he knows. The explanation on its face is an innocent one. As stated in

People v. Gale (1956), 46 Cal. 2d 253, 294 P. 2d 13,

at page 257 of the California Report:

> "Even if it is assumed that the damaged condition of the car would justify the officers in stopping it

and questioning the driver (citing cases), when that questioning elicited an explanation wholly consistent with innocence, no basis was established for arresting defendant and searching him and his car."

Nor, in the instant case, would the fact that Evan Rodgers failed to meet anyone he knew at the race track be probable cause to arrest his wife some thirty miles away for a narcotics violation.

In conclusion, on this point appellant submits that there was not a single iota of corroboration of the story given to Agent Spohr by Gilbert Martinez; that Martinez was not only an informant of unknown reliability and, in fact, completely unknown as to identity but was not a person of good repute upon whose story credence could be put. Furthermore, the fact that Martinez was confined and interrogated an unreasonable amount of time created a mental climate which was not conducive to a voluntary offer of cooperation. This was known by the agent and should have been considered by him. The uncorroborated statement of an informant of unknown reliability does not constitute probable cause for an arrest without a warrant. There was no probable cause to arrest the appellant.

III.

Certain of the Findings of Fact Are Not Supported by the Evidence.

In raising this ground of appeal, appellant is mindful of the semi sacrosanct position accorded findings of fact by reviewing courts. However, certain of the findings of fact made by the court below are clearly erroneous and have no support in the evidence. When an attack is made on the findings of fact, a reviewing court may, in reviewing the entire evidence, be left with a firm convic-

tion that a mistake has been committed and, if this be so, the finding may be reversed. This precept was stated by the Supreme Court in

United States v. United States Gypsum Co. (1948), 333 U. S. 364, 92 L. Ed. 746,

wherein it was stated at page 766 of the Lawyer's Edition of the United States Report:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibity of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

United States v. Oregon State Medical Soc. (1952), 343 U. S. 326, 96 L. Ed. 978;

Gamewell Company v. City of Phoenix (9th Cir., 1954), 216 F. 2d 928;

Alaska Freight Lines v. Harry (9th Cir., 1955), 220 F. 2d 272.

In conformity to the mandate of Rule 18(d) of this court, appellant hereinafter states as particularly as may be wherein the complained of findings of fact are erroneous.

(a) *The findings of fact that the court took judicial notice that it would occasion a delay of several hours to secure a warrant of arrest for appellant is not supported by the evidence.*

Appellant submits that that portion of Finding of Fact III [Clk. Tr. 47, lines 18-21], which states:

> "The Court took judicial notice that if a judge or commissioner were found at home, the distances and traffic conditions would cause several hours delay if a warrant were sought"

is not supported at all by the evidence and, therefore, is clearly erroneous within the definition of

> *United States v. United States Gypsum Co.* (1948), 333 U. S. 364, 92 L. Ed. 746, *supra.*

At the hearing below defense counsel attempted to establish that there were sufficient magistrates available so that the arresting officers should have attempted to get an arrest warrant prior to arresting appellant [Tr. 149-153]. The sole reference by the court made to the availability of judicial officers is contained at page 151 of the Transcript, wherein the court stated:

> "* * * Let the record show, first, that the Commissioner lives in Point Loma, and that probably at best, if available at the home, it would be thirty minutes or more before she could be reached."

This reference was made with respect to the Honorable Betty Graydon, United States Commissioner in San Diego. It does not purport to be judicial notice that any attempt to have a warrant issued by federal judge, state judge, or other judicial officer would necessitate a delay of several hours. The failure of the officers even to attempt to secure

a warrant is of paramount importance in a case of this type where probable cause for an arrest without a warrant is so obviously lacking. It appears to be well established in the federal judicial that, barring exceptional circumstances, a warrant for arrest should be obtained. It would appear under the facts of this case that the motivating reason for not securing a warrant was that it would be more inconvenient for the officers to do so rather than go directly to the bus station and make the arrest. The United States Supreme Court in commenting on this subject in

> *Johnson v. United States* (1948), 33 U. S. 10, 92 L. Ed. 436, at 440-441,

stated:

> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement."

The point was made by Agent Spohr in testifying that he felt that "time was of the essence and the delay would be too great" [Tr. 153]. The basis for this statement is the fact that appellant was supposedly waiting in the bus station and would, if not immediately apprehended, take "the bus north" [Tr. 115]. Appellant contends that on the basis of Martinez's information the appellant and Mrs. Martinez were to wait in the Greyhound Bus station

until Rodgers and Martinez picked them up [Tr. 107]. It is unreasonable to suppose that the slight delay necessitated for a warrant would have caused appellant to flee [Tr. 154].

In addition, this is not the classical type of emergency case where the suspected person is in an automobile or is in danger of vanishing into a crowd. As Agent Spohr stated at page 115 of the Transcript, he was afraid the women would take the bus north. Assuming that the women had left by the time Spohr arrived at the depot with his warrant of arrest, it would have been a simple matter to overhaul the bus which would have been proceeding north on a predetermined route and apprehend appellant. In these circumstances a finding that judicial notice was taken that several hours' delay would result from an attempt to secure a warrant works clear prejudice upon the appellant. The finding is not only erroneous it is also entirely unsupported. The agents had ample time to secure a warrant and by failing to do so violated appellant's rights under the Fourth Amendment.

(b) *The finding of fact that informer Gilbert Martinez told witness Spohr that appellant transported heroin across the border in her body cavity is not supported by the evidence.*

Appellant objects to that portion of Finding of Fact III contained on pages 46 and 47 of the Clerk's Transcript which states:

> "Mr. Martinez then told Agent Spohr the following: "* * * that on October 11, 1957, at about 1:00 p.m., Mrs. Rodgers and Mrs. Martinez returned to the United States on foot through the port of San Ysidro, with the Heroin concealed by Mrs. Rodgers in her body cavity * * *."

While it is true that appellant has stipulated [Clk. Tr. 56-57] that appellant brought into the United States from Mexico the powder contained in two rubber contraceptives and that said powder was found to be heroin, said stipulation does not relate back to the time prior to the arrest and so does not go to affect the probable cause which the agent had for arrest. The finding is unsupported in the evidence in that nowhere in the Transcript is there testimony by Agent Spohr that Martinez told him that Mrs. Rodgers did, in fact, cross the border with heroin in her body cavity or, for that matter, elsewhere on her person. The sole reference made to this part of the transaction by Martinez according to Agent Spohr is contained at pages 107 and 108 of the Transcript. According to Spohr, Martinez told him the following:

> "* * * On Friday morning—they stayed over Thursday; Mr. Rodgers was rather tired—on Friday morning Mr. Rodgers *suggested* that his wife Nadine would conceal the heroin in her inner body cavity and carry it across the line afoot accompanied by Mrs. Martinez, * * *" (Emphasis added.)

At page 108, the court queried:

> "* * * Did he tell you whether or not the two women, Mrs. Rodgers and Mrs. Martinez, did cross on foot into the United States?
>
> The Witness: Yes, sir, they had crossed two hours before they had come into the line."

A perusal of the foregoing testimony reveals no statement by Martinez that appellant did in fact carry heroin across the international boundary. He states that it was suggested that she should and that she did, in fact, cross the boundary; but there is no statement that, when she did cross the boundary, she had acquiesced in her husband's

suggestion and had transported the heroin. Accordingly, the above quoted finding is totally without support in the evidence. If Agent Spohr were not informed that appellant had transported the narcotics across the international line, he would have no cause whatsoever to arrest appellant even if he could believe the story of Martinez. The finding of fact is of vital importance.

(c) *The finding of fact that there was corroborating evidence for the story of informer Martinez is not supported by the evidence.*

Appellant objects to that portion of Finding of Fact III contained on page 47, lines 13 and 14, of the Clerk's Transcript, which reads as follows:

> "Both agents believed that Martinez and the corroborating evidence *evidence* * * *."
>
> (This is obviously a typographical error and appellant construes it to mean that both agents believed Martinez and the corroborating evidence.)

Appellant objects to this finding in so far as it purports to hold that there was any corroborating evidence for the story of Gilbert Martinez. Appellant's view on this has been set forth at length under heading II above, page 13 *et seq.* Therefore, it would serve no useful purpose to reiterate the argument except to say that it is the position of the appellant that there is no corroboration whatsoever for the story of Martinez.

IV.

Certain of the Conclusions of Law Are Not Well Taken in Law, nor Are They Supported by the Findings of Fact or by the Evidence.

Appellant next urges upon this court the error of certain conclusions of law made by the trial court. The basic principles involved in appellant's objections to many of these conclusions have already been stated under headings II and III, *supra,* and, while appellant will not reargue *ex extenso* points already covered, a brief summation will be made in those cases.

(a) *The conclusion of law that Agents Gates and Spohr had reasonable grounds to believe that appellant had brought heroin into the United States is not supported at law, by the findings of fact, or by the evidence.*

Appellant objects to Conclusions of Law I [Clk. Tr. 50], which reads:

> "Customs Agents Spohr and Gates had reasonable grounds to believe that on or about October 11, 1957, defendant NADINE E. RODGERS did knowingly import and bring into the United States of America from a foreign country; namely Mexico, a certain narcotic drug; namely, approximately 400 grains of Heroin, contrary to law. Both agents acted in good faith and believed the information supplied by Gilbert Martinez. * * *"

(The subjective good faith of the agents is not questioned. In fact, the good faith of Agent Spohr was stipulated.) [Tr. 120.] This point has heretofore been discussed under heading II, wherein appellant argued that the agents did not possess such information as would permit

them to have probable cause to arrest appellant without a warrant. Martinez, the informer who supplied all of the information the agents had, was a person unknown to the agents prior to their interrogation of him. The agents had had no prior dealings with Martinez which would establish his reliability as an informant who gave valid information. During the Martinez interrogation certain facts were brought out which would tend to discredit Martinez such as the fact that he was a heroin addict, was presently awaiting trial on a violation of the California Health and Safety Code. In addition, Martinez was subjected to a considerable amount of compulsion because of the protracted interrogation to which he was subjected and because of his prolonged confinement, all of which should have lessened the validity of his story in the eyes of the agents. Since there was no valid corroborating evidence for the story of Martinez, so that the story stood alone as a basis for probable cause, the conclusion of law that the agents had reasonable grounds to believe that appellant had brought heroin into the United States is not supported in law, by the findings of fact, or by the evidence.

(b) *The conclusion of law that there was independent corroboration for much of Martinez's statement to the officers is not supported in law, by the findings of fact, or by the evidence.*

Appellant objects to the last line of Conclusion of Law I [Clk. Tr. 50], which reads: "There was independent corroboration for much of Martinez' statement to the officers." This has already been discussed at length in heading II, *supra.* The points of corroboration which were relied upon by the government below were the past

narcotics record of defendant Rodgers which, as appellant has previously pointed out, cannot be taken as reasonable cause to arrest his wife; nor is it corroborative of any of Martinez's story inasmuch as Martinez did not mention Rodgers' prior conviction.

The $2,000 check carried by Rodgers does not corroborate the fact that the parties returned to Los Angeles inasmuch as the check is not in evidence and the testimony did not show whether it was on a Los Angeles branch of the Bank of America.

The fact that there was woman's clothing in the trunk of the car was corroborative of no portion of Martinez's story since it is susceptible of an innocent interpretation in that Rodgers admitted that he and his wife had come from San Francisco and that she was in Los Angeles. In any event, there is nothing in the testimony to indicate any relation between appellant and the clothes found in the car.

The fact that Martinez was greeted by his wife in a public restaurant certainly corroborates nothing since it is uniformly held that the mere fact that someone is lawfully in a public place where an informer says they will be (and here she was not in that place) is not corroborative of the informant's story. If the parties have a right to be in that public place, it is certainly not corroboration of the story if a husband and wife exchange greetings in that public place. For a like reason, the fact that Mrs. Martinez and appellant stated to the agents in response to their questions that they were, in fact, Mrs. Martinez and Mrs. Rodgers is noncorroborative of Martinez's story since, as it appears from the record, the women were lawfully in a public restaurant drinking coffee "just like anyone else." Certainly they would be ex-

pected to give their names to an officer who has identified himself as a customs agent and has requested their names. The fact that the women stated that they had come from Mexico and had Mexican baskets in their possession is not corroboration of Martinez's story since many people lawfully come from Mexico every day. However, determinative of this point is the fact that at the time these facts were ascertained the arrest had already taken place, and the initial unlawfulness of the arrest cannot be cured by the fruits of a search incident thereto.

The fact that Martinez gave the names of agents in San Francisco cannot be considered corroborative of his story since anyone admittedly in the narcotics difficulties that he was in might well know the names of narcotics agents in the same locality. In addition, under the holding of

> *Worthington v. United States* (6th Cir., 1948), 166 F. 2d 557, *supra,*

probable cause cannot be based upon information supplied the arresting agent by another agent. In this case had the named agents from San Francisco themselves informed Spohr that Martinez was reliable as an informant, Spohr would not be justified in relying upon this in believing Martinez's story. This being so, it is submitted that the information supplied by Martinez himself cannot establish his own reliability. Reliability can only be established by the personal experience of the agent with the informant and here there was none.

Finally, the statement of Rodgers that he had met no one he knew at the race track cannot corroborate Martinez's story, for the way of the world indicates that, when people casually drop by to see friends without previous arrangement, the friends are often not there.

Based upon the foregoing, appellant objects to the conclusion of law that there was independent corroboration for much of Martinez's statement. There was no corroboration.

(c) *The conclusion of law that Agents Gates and Spohr believed the information supplied by Gilbert Martinez is not consistent in law with a reasonable belief founded upon the findings of fact and upon the evidence.*

Appellant objects to that portion of Conclusion of Law I which states: "Both agents * * * believed the information supplied by Gilbert Martinez" [Clk. Tr. 50]. It is the position of appellant that such a belief is not reasonable under the law in the light of the facts of this case. The reasons for appellant's position have been thoroughly discussed under heading II and subheadings (a) and (b) of this heading (IV). Suffice it to say that there was no corroboration for Martinez's story. The story was coerced, and Martinez was an informant of unknown reliability. In the light of these facts, it was unreasonable of the agents to believe the information supplied by Martinez.

(d) *The conclusion of law that the arrest of appellant was valid and legal is not supported in law by the finding of fact or by the evidence.*

Appellant objects to that portion of Conclusion of Law II [Clk. Tr. 50], which reads as follows: "The arrest of defendant NADINE E. RODGERS at San Diego on October 11, 1957, without a warrant was valid and legal." Inasmuch as appellant was arrested without a warrant, the arrest could only be valid and legal if made by the agents upon probable cause. As has been heretofore stated, the

arrest was predicated solely upon the uncorroborated information supplied by an informant of unknown reliability, and said information was coerced from said informant under circumstances which created a mental climate conducive to untruths rather than a true and voluntary statement. Appellant refers to the discussions of this point made in heading II and in the previous subheadings of this heading (IV).

(e) *The conclusion of law enumerating the powers of arrest of treasury agents is not supported in law, by the findings of fact, or by the evidence in so far as it purports to conclude that the agents had reasonable grounds to arrest appellant without an arrest warrant.*

Appellant objects to Conclusion of Law II [Clk. Tr. 50] in so far as it purports to conclude that the agents had reasonable grounds to arrest appellant without a warrant. The arresting authority of the agents in question is derived from Title 26, U. S. C. A., Section 7607, which empowers them to—

> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * or marihuana * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

There is no contention here that the violation was committed in the presence of the agents. In fact, appellant was sitting in a public coffee shop drinking coffee "just like anybody else"—"just like the rest of the people in the restaurant" and "there wasn't anything suspicious about what they were doing" [Tr. 156].

The arrest of appellant, therefore, can only be justified under the second clause of the officers' authority, to wit: "Where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation" (Title 26, U. S. C. A., Sec. 7607). As heretofore argued under heading II and the previous subheadings of this heading (IV), the agents did not have probable cause to arrest appellant without a warrant.

(f) *The conclusion of law that the agents had a right to search appellant following her arrest is not supported in law, by the findings of fact, or by the evidence and particularly is not so supported in so far as it purports to conclude that appellant's arrest was not unlawful.*

Appellant objects to that portion of Conclusion of Law III [Clk. Tr. 50], which reads: "The agents had a right to search NADINE E. RODGERS following the arrest; * * *" For the reasons heretofore stated, the agents did not have probable cause to arrest appellant without a warrant. Accordingly, the arrest was unlawful. The right of a legal search without a warrant exists only in so far as it is incident to a lawful arrest. Since the arrest was unlawful, the resulting search was unlawful and the fruits turned up by the search cannot retroactively validate the arrest.

United States v. Di Re (1948), 332 U. S. 581, 92 L. Ed. 210, 220.

(g) *The conclusion of law that no search was made of appellant, that the seizure of heroin from appellant was valid and legal, that the appellant agreed to surrender the narcotics, and that no unreasonable means were used is not supported in law by the findings of fact or by the evidence and particularly is not so supported in so far as it purports to conclude that the seizure of heroin from appellant was in any way made possible by a voluntary disclosure of said heroin by appellant to the arresting officer.*

Appellant objects to that portion of Conclusion of Law III [Clk. Tr. 50-51], which states:

> "* * * However, no search occurred. The seizure of Heroin from NADINE E. ROGERS on October 11, 1957, at San Diego City Jail was valid and legal. The defendant agreed to surrender the narcotics. No unreasonable means were used."

This conclusion is apparently based upon the facts which occurred at the San Diego City Jail when Agent Spohr gained possession of the narcotics in question from appellant. Agent Spohr testified on this point as follows [Tr. 116 *et seq.*]:

> "Q. And as you walked down the corridor, did you observe anything that made you suspicious? A. Yes, sir, I did.
>
> Q. What did you observe? A. As we got—as we were about halfway down the corridor, I noticed that Mrs. Rodgers had a kleenex which she was attempting to press in her left hand, attempting to conceal close to the skirt of her dress.
>
> Q. Did you say anything to her? A. Yes, sir, I did. I asked her what she had in her hand and *I would like to see it.*

Q. What did she do? A. She opened her hand and showed the kleenex, and *I asked her to give it to me.*

Q. What did she do? A. She gave it to me.

Q. Did you examine what had been in her hand? A. Yes, sir, I did.

Q. What was it? A. Upon opening the kleenex, there concealed was a rubber contraceptive with a white powder resembling heroin.

* * * * * * * *

Q. Then did you say anything else to her? A. Yes, sir. My next remark was, 'Where is the rest of it?'

Q. What did she do? A. She reached in her brassiere inside her dress—I assume her brassiere, and extracted another kleenex.

Q. And what was in that kleenex? A. When that was opened, there was another rubber contraceptive containing a substance that resembled heroin." (Emphasis added.)

The comment of the court on this procedure is enlightening. At page 118 of the Transcript, the court stated: "Actually, you never made a search of her person?"

The conclusion of law is apparently founded upon the fallacious ground that there has to be actual force and violence used on a person in searching him in order to constitute a search. Appellant submits that this is not so. Appellant had been arrested and was held by the United States Customs Agents under their official authority. Can it be said that in such a case a person so held must resist search to the utmost of his physical abilities and, failing to do so, that said person has voluntarily disclosed the contraband thus waiving his rights under the Fourth

Amendment? Appellant contends that this question must be answered by this court in the negative. As stated by Judge McAllister in his dissenting opinion in

> *Gilliam v. United States* (6th Cir., 1951), 189 F. 2d 321, 327:
>
> "At that time he was as fully within their power and subject to their will as though they were seizing him and holding him until they found out what they wanted. I do not believe that a citizen has to risk trying to escape and being shot to prove that his actions under such circumstances are not voluntary."

Appellant's position is supported by the Eighth Circuit in

> *Hobson v. United States* (8th Cir., 1955), 226 F. 2d 890.

In that case government agents attempted an unlawful entry without a warrant into appellant's home. While certain agents were pounding on the front door, an agent stationed as a lookout at the rear of the house shouted, " 'He threw some "stuff" out of the window' " the "stuff" thrown out of the window proved to be contraband heroin. The trial court refused to suppress this evidence upon defendant's motion, saying—

> " 'Well, I am afraid that when the defendant did that, whatever constitutional rights he had, he threw out the window with them, because that was a voluntary disclosure on his part of the possession of contraband, and officers of the law, like others, do not need to shut their eyes and look the other way when they see an offense being committed, * * *' "

In reversing the trial court, the Court of Appeals stated at page 894:

> "Considering the total atmosphere of the case as directed by *United States v. Rabinowitz, supra,* we

> can not separate the throwing of the package from the unlawful search. *The defendant's action in throwing the package was not voluntary but was forced by the actions of the officers.* That the officers anticipated such a result is evidenced by the fact that they stationed a man in the back yard to receive any person or evidence that might come out. *The throwing of the package was directly caused by the actions of the officers.*" (Emphasis added.)

It would be specious reasoning to say that merely because Agent Spohr did not touch appellant at the time he requested her to give him the heroin her act in turning over the heroin in response to his request constituted a voluntary disclosure of the evidence. The heroin was given to Spohr solely because appellant was held under the authority of the United States and was powerless to resist. The situation in which she found herself had its genesis in her unlawful arrest by the agents. Her act was compelled directly by the unlawful act of the agents. It cannot be regarded as a voluntary disclosure.

V.

It Was Error for the Trial Court to Refuse to Permit Appellant's Counsel to Examine the Report From Which Spohr Refreshed His Recollection While Testifying at the Trial.

Appellant's final point on this appeal is that error was committed by the court below when the court refused to allow appellant's counsel to examine a report from which Agent Clarence Spohr from time to time refreshed his memory while testifying. During the cross-examination of Agent Spohr, he made reference from time to time [Tr. 138-141, 145, 164, 165] to a report which he had made on the subject of his interrogation of Rodgers and

Martinez and upon the subsequent proceedings leading up to appellant's arrest. In order to further his cross-examination of Agent Spohr, Mr. Steward, appellant's counsel below, endeavored to examine the report in an attempt not only to develop contradictions between the report and the testimony but to test the witness' memory by ascertaining whether all the testimony given at the trial was contained in the report or whether the report contained some matters not brought out by the agent's testimony. This request was denied by the court and, although thrice renewed by Mr. Steward, the court was adamant in its refusal to allow examination of more than a single portion of the report. The testimony on this subject is covered at pages 165 *et seq.* of the Transcript:

> "Mr. Steward: May I look at the other paper that he used to refresh his recollection?
>
> The Court: On what matter?
>
> Mr. Steward: The earlier one on the address and occupation of the Martinez'—not the occupation, but the address.
>
> The Court: Do you have it there before you?
>
> The Witness: No, sir; that is back in the file. It is the folded up piece of paper.
>
> Mr. Seavey (handing document to the witness): Is this the one?
>
> The Witness: May I see it? (A pause.)
>
> Mr. Steward: Is that the one you previously used?
>
> The Witness: Yes, it is.
>
> Mr. Steward: May I see it, your Honor?
>
> The Court: Let me look at it.
>
> The Witness (handing document to the Court): The address is down at the bottom.

The Court: Mr. Steward. (Showing document to Mr. Steward.)

Mr. Steward: Are you just going to show me that portion of it?

The Court: Yes, that is what you wanted to see, the notes that showed the address and Martinez' place of employment.

Mr. Steward: I would like to see them all, your Honor.

The Court: I wouldn't be surprised you would.

Mr. Steward: Could it be marked, your Honor?

The Court: For identification?

Mr. Steward: Yes, your Honor.

The Court: It will be marked for identification and ordered sealed by the Clerk.

Mr. Steward: Very well, your Honor.

* * * * * * * *

Mr. Steward: And also, your Honor, I would like to see the note that he looked at here to refresh his recollection as to the amount of money he had, which I think, your Honor, would be material, as one with a lot of money would probably be less likely to be involved in some illicit enterprise such as this than one without funds.

The Court: I don't think that follows. The request is denied.

Are you through with this witness?"

By this action the court prevented the appellant from examining a specified report from which appellant might very well have made telling cross-examination. Since the court ordered the exhibit sealed, we have no way of knowing whether or not this is true; but the opportunity should have been afforded to appellant to view the document and make the decision. The court acted in an arbitrary man-

ner by apparently deciding from its examination of the document in question that there was nothing therein which would aid the defense. It is submitted to this Honorable Court that the question of whether or not the contents of a document will prove of help to a defendant on cross-examining government witnesses is a matter for the defendant to decide and the sole function of the court, absent a declaration of government privilege, is to determine the legal propriety of the questions which examination of the documents prompts defendant to ask. The precise point is covered in the case of

Jencks v. United States (1957), 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103,

wherein it was stated at page 667 of the United States Report:

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.
>
> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflicts, as in Gordon, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our

standards for the administration of criminal justice in the federal courts and must therefore be rejected. For the interest of the United States in a criminal prosecution '* * * is not that it shall win a case, but that justice shall be done * * *.' *Berger v. United States,* 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314.

"This Court held in *Goldman v. United States,* 316 U. S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322, that the trial judge had discretion to deny inspection when the witness '* * * *does not use his notes or memoranda* (relating to his testimony) in court * * *.' We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. *We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them.* Justice requires no less." (Emphasis added.)

The court went on to decry the practice pursued by the trial judge below in examining the documents in order that he might determine whether in his mind the documents were relevant or material. At page 669 of the United States Report the court states:

"The practice of producing government documents to the trial judge for his determination of relevancy

and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See *Gordon v. United States,* 344 U. S., at page 418, 73 S. Ct., at page 372."

Appellant submits that the facts of the instant case bring it squarely within the rule of the *Jencks* case. The request to inspect was made during a cross-examination in which the witness had repeatedly referred to the report in question. The request was specific, relating to a certain report and not a general all-encompassing fishing expedition of the government's files. From some of the answers of the witness and from the necessity of his constant reference to his file, it was apparent that, to paraphrase the *Jencks* case, time had dulled his treacherous memory. The court was on notice that counsel wished to inspect the documents since he thrice requested them and was rebuffed. Appellant should have been accorded the right to inspect the documents since appellant was the only one who could determine whether the contents thereof were material to the case. The trial judge engaged in a disapproved practice when he insisted on substituting his own judgment of materiality for that of the appellant. This was error.

Conclusion.

Recapitulating appellant's position, it is appellant's contention that her arrest was unlawful because the arresting officers, in arresting appellant without a warrant, acted without probable cause to believe that appellant had committed a crime. By so acting the officers violated appellant's constitutional rights guaranteed her under the Fourth Amendment of the Constitution. The arresting agents acted solely upon the story of Gilbert Martinez. They had never seen Martinez before. They knew nothing of his reliability, and they secured the information from him by coercive interrogation. It is established that the uncorroborated information of an informant of unknown reliability does not constitute probable cause for arrest without a warrant. There was no corroboration in this case. The prior narcotics conviction of appellant's deceased husband gives no probable cause as to appellant. There was no showing that the $2,000 cashier's check in the possession of appellant's deceased husband in any way corroborated the story of Martinez that said check had been obtained in Los Angeles. The fact that there was woman's clothing in the trunk of the car belonging to appellant's deceased husband has an innocent explanation that appellant and her husband were at that time traveling from their home in San Francisco. Furthermore, nothing appears in the record which would connect the clothes found in the car with appellant. There is no corroboration from the fact that informant Martinez knew and greeted his wife in the coffee shop of the Pickwick Hotel. Appellant and Mrs. Martinez had a perfect right to be in said coffee shop. It was a public place and their presence there raised no admissible inference that appellant was committing a crime; nor does it furnish corrobo-

ration for the story of Martinez. This is a different situation from the one where an informant's testimony leads officers to find the accused person in some strange or unusual place where ordinarily he would not be. Martinez's story was not corroborated by the statement of the women that they had come from Mexico or their possession of Mexican baskets. Prior to the discovery of these facts, appellant had been placed under arrest. The subsequent discovery of these facts could in no way affect the state of mind of the agents at the time they made the arrest. Particularly is this true in light of the fact that the agents admitted that they had already decided to arrest appellant upon their entry into the coffee shop.

The validity of an arrest without a warrant is established by the state of mind of the officers at the moment of making the arrest and, if illegal at that time, cannot be made legal by reason of the fruits of the subsequent search.

The court below erred in certain of its findings of fact and conclusions of law. Most of these errors relate to the question of whether there was probable cause to arrest without a warrant and, accordingly, will not be further belabored here. There is no support, however, for the finding of fact that the court took judicial notice that an attempt to secure a warrant of arrest would necessitate a delay of several hours. Arrests without a warrant on probable cause are generally viewed with disfavor where there was time to obtain a warrant and the officers fail to do so.

The conclusion of law that no search was made of appellant is erroneous. The use of force in extracting contraband from an arrested person is not a requisite of a search. Submission to lawful authority and the request of the officers of the law constitute a search whether or

not the arrested person is physically compelled to yield the contraband. There was no voluntary disclosure in this case since appellant's action in turning over the contraband was compelled by the original wrongful act of the officers in arresting her without probable cause.

The trial judge erred in refusing to permit appellant's counsel to examine the report to which Agent Spohr repeatedly referred under cross-examination. It is not necessary that an inconsistency between the report and the testimony be shown as a prerequisite foundation to divulgence of the contents of the report to a defendant. The defendant in a criminal case is the sole person in a position to judge whether or not the material in a government file is material and relevant to his case. The trial court should have permitted appellant's counsel to examine the report of Agent Spohr to make this determination. By refusing three requests of appellant's counsel for specific documents and then by substituting the court's determination of materiality for the defendants', the court committed error.

Despite the fact that appellant admittedly was in possession of heroin and admittedly had unlawfully brought that heroin into this country, she is no less entitled to the protection of the United States Constitution. As has been repeatedly stated by our courts, the Constitution protects guilty and innocent alike. In the words of Judge Youngdahl in

> *United States v. Castle* (D. C. D. C., 1955), 138 Fed. Supp. 436, 440:
>
> "The peddling of narcotics is a singularly detestable and reprehensible crime. It is a widespread evil which widely corrupts and even destroys those it touches. It must be wiped out, but it must be wiped

out in a manner consistent with the protections our Constitution affords all people, innocent and guilty alike."

In the premises, it is appellant's contention that this Honorable Court should reverse the judgment of conviction below and order the unlawfully seized narcotics suppressed.

Respectfully submitted,

HARRY D. STEWARD,

THOMAS H. LUDLOW, JR.,

Attorneys for Appellant.